89-1045

No. _____

Supreme Court, U.S.
FILED
DEC 5 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

HEALTHMASTER, INC. and HEALTHMASTER HOME HEALTH CARE OF GEORGIA, INC.,

Petitioners,

v.

CHATTAHOOCHEE VALLEY HOME HEALTH CARE, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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QUESTION PRESENTED

Is a litigant denied due process of law in violation of the Fourteenth Amendment of the Constitution of the United States when a state court vacates a previously granted writ of certiorari without explanation, without notice that the writ was at issue, and without allowing an opportunity to be heard concerning the court's revisitation of the writ as an issue?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were the petitioners Healthmaster, Inc. and Healthmaster Home Health Care of Georgia, Inc. and the respondent Chattahoochee Valley Home Health Care, Inc. The State Health Planning Agency was a party before the Superior Court of Muscogee County and the Court of Appeals of Georgia, but did not participate in the certiorari proceedings before the Supreme Court of Georgia from which this petition arises and is therefore not named as a party herein.

Healthmaster, Inc. has no parents or affiliates, and has no subsidiaries other than wholly owned subsidiaries. Healthmaster Home Health Care of Georgia, Inc. is a wholly owned subsidiary of Healthmaster, Inc., has no subsidiaries, and has no affiliates other than the other wholly owned subsidiaries of Healthmaster, Inc.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

HEALTHMASTER, INC. and HEALTHMASTER HOME HEALTH CARE OF GEORGIA, INC.,

Petitioners,

v.

CHATTAHOOCHEE VALLEY HOME HEALTH CARE, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

The petitioners Healthmaster, Inc. and Healthmaster Home Health Care of Georgia, Inc. respectfully pray that a writ of certiorari issue to review the order of the Supreme Court of Georgia entered in the above-entitled proceeding on July 13, 1989.

OPINIONS BELOW

The order of the Supreme Court of Georgia granting the writ of certiorari has not been reported but is reprinted in the appendix hereto, p. 3a, *infra*. The order of the Supreme Court of Georgia vacating certiorari is reported at 259 Ga. 387, ___ S.E.2d ___ (1989), and is reprinted in the appendix hereto, p. 2a, *infra*. The order of the Supreme Court of Georgia denying rehearing has not been reported but is reprinted in the appendix hereto, p. 1a, *infra*. The decision of the Court of Appeals of Georgia is reported at 191 Ga. App. 42, 381 S.E.2d 56 (1989),

and is reprinted in the appendix hereto, p. 4a, *infra*. The decision of the Superior Court of Muscogee County has not been reported but is reprinted in the appendix hereto, p. 10a, *infra*. The declaratory ruling of the State Health Planning Agency has not been reported, but is reprinted in the Appendix hereto, p. 12a, *:nfra*.

JURISDICTION

The order of the Supreme Court of Georgia as to which petitioners seek review was entered July 13, 1989. Rehearing was denied by the Supreme Court of Georgia by order dated September 6, 1989. The jurisdiction of this Court to review the order of the Supreme Court of Georgia is invoked under 28 U.S.C. § 1253(a).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. amend. XIV, § 1.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioners Healthmaster, Inc. and Healthmaster Home Health Care of Georgia, Inc. (collectively "Healthmaster") own and operate home health agencies in service areas within the State of Georgia. On March 30, 1987, Healthmaster petitioned the State Health Planning

Agency ("SHPA") for a declaratory ruling as to Healthmaster's right to operate in certain areas. On June 11, 1987, SHPA issued its ruling. This ruling was appealed to the Superior Court of Muscogee County by respondent Chattahoochee Valley Home Health Care, Inc. ("Chattahoochee"), a home health agency which competes with Healthmaster. On April 25, 1988, the Superior Court issued an order affirming SHPA's ruling. Chattahoochee appealed this order to the Court of Appeals of Georgia. On March 27, 1989, the Court of Appeals of Georgia reversed the Superior Court's affirmance of SHPA's declaratory ruling. This decision was contrary to law on several points. Accordingly, Healthmaster petitioned the Supreme Court of Georgia for a writ of certiorari to review the Court of Appeals' decision.

The issues raised by Healthmaster's petition for certiorari were thoroughly briefed by Healthmaster, Chattahoochee, and another group of home health agencies as *amicus curiae*. In particular, considerable attention was focused by all of the briefs, both for and against the writ, on the sole criterion established by Georgia law for the grant of certiorari: whether a case is "of gravity or great public importance." Ga. Const. 1983 art. VI, § 6, ¶ 5. Healthmaster pointed out at some length that the Court of Appeals' decision, if not reversed, would lead to a fundamental restructuring of the entire home health care industry in Georgia — a result affecting more than seventy companies serving more than 50,000 patients each year. In addition, Healthmaster noted that the Court of Appeals' erroneous pronouncements on key issues of administrative law would seriously undermine well-established powers of administrative agencies to remedy

inequities within their programs. The court apparently agreed with Healthmaster that these issues were of gravity and great public importance, because on May 4, 1989 it granted the writ of certiorari.

Following the grant of certiorari, the case was briefed and orally argued by all parties. At no time during these proceedings did the court or any party raise any new issue concerning the importance of the case or the necessity for the writ. The possible revocation of the writ was never addressed in any way by the court or any party. In fact, although the court could easily have inquired at oral argument about any issue relating to the case, including any issue relating to the writ itself, the court chose to remain completely silent. It asked no questions, made no comments.

It came as quite a surprise, therefore, when the court issued an order on July 13, 1989 stating *per curiam* that "[a]fter plenary consideration of this matter . . . it is found not to satisfy the criteria for the grant of certiorari, and the writ is therefore vacated." 259 Ga. 387, ___ S.E.2d ___ (1989) (p. 2a, *infra*). Healthmaster promptly moved for rehearing, pointing out that the vacation of the writ without notice, explanation, or opportunity to be heard in this manner was contrary to precedent, defeated Healthmaster's legitimate entitlement to a ruling on the merits, and effectively precluded Healthmaster from making any meaningful argument in favor of rehearing because Healthmaster could only speculate as to the reasoning underlying the court's action. Healthmaster specifically noted in its motion for rehearing that "while the [Georgia Supreme] Court may have considerable discretion in deciding whether to grant certiorari, fundamental concepts

of fairness and due process require at least notice and an opportunity to be heard before certiorari, once granted, is revoked," citing U.S. Const. amend. XIV, § 1. Healthmaster also referred the court to another case in which the court had afforded much fairer treatment to another litigant, and pointed out that the court's treatment of Healthmaster "does not afford Healthmaster due process and contrasts sharply with the treatment afforded other appellants." The court denied this motion without discussion on September 6, 1989, but did stay the remittitur pending a decision by this Court on this petition for certiorari.

REASONS FOR GRANTING THE WRIT

In Georgia as in other states, the writ of certiorari is frequently sought but rarely granted. *Todd v. Dekle*, 240 Ga. 842, 843 n.2, 242 S.E.2d 613, 615 n.2 (1978) (eighty percent of applications for certiorari denied). The decision whether to grant the writ rests entirely within the discretion of the court, and that discretion will be exercised only when a case is of "gravity or great public importance." Ga. Const. 1983 art. VI, § 6, ¶ 5; *Todd*, 240 Ga. at 843-44, 242 S.E.2d at 614-15. The decisions and rules of the Supreme Court of Georgia make clear that the writ will not issue as of right. *Central of Georgia Railway Co. v. Yesbik*, 146 Ga. 620, 622, 91 S.E. 873 (1917); Rule 29 of the Rules of the Supreme Court of the State of Georgia, 252 Ga. A-6 (1984).

Healthmaster does not question the discretionary nature of the grant of the writ. Instead, this case involves the issue of whether the writ, once granted, vested Healthmaster with certain rights which could not be revoked without notice and an opportunity to be heard.

The principle at issue has been stated as follows: "[g]enerally, the discretionary stage passes when the writ issues and the record of the inferior court is certified. The court thereafter has no option but to hear and determine the cause." 14 Am. Jur. 2d *Certiorari* § 8 (1964). *Accord, Ex Parte Krasner*, 249 Ala. 640, 32 So. 2d 678, 680 (1947); *Independent Pub. Co. v. American Press Ass'n*, 102 Ala. 475, 15 So. 947, 954 (1894).

Although this issue has not previously been addressed directly by this Court, past decisions indicate that this Court will not dismiss a writ of certiorari as improvidently granted "in the absence of considerations appearing which were not manifest or fully apprehended at the time certiorari was granted." *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521, 559 (1957) (Harlan, J., concurring and dissenting), *followed in The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 183 (1959). In particular, members of this Court have strongly disapproved the practice of revoking certiorari without an adequate explanation of those circumstances the Court had not originally apprehended. *Burrell v. McCray*, 426 U.S. 471, 473-74 (1976) (Brennan, J. and Marshall, J., dissenting).

It is important that the Court resolve this issue now because the summary revocation of certiorari has become an increasingly common occurrence in Georgia, causing litigants substantial unnecessary expense and depriving them of the orderly judicial process to which they are entitled. Whatever the Supreme Court of Georgia's reasons may be for adopting this method for disposing of cases, the practice violates litigants' right to due process of law guaranteed by the Fourteenth Amendment. Due process rights are implicated in the same sense that a license,

governmental benefit, or right to appear before a court *pro hac vice*, once granted, cannot be revoked without notice and an opportunity to be heard. *Bell v. Burson*, 402 U.S. 535, 539 (1971) (license, once granted, vests right to due process prior to revocation); *Goss v. Lopez*, 419 U.S. 565, 573-74 (1975) (governmental benefits such as employment, welfare payments, parole, good-time credits, and education vest right to due process prior to revocation); *Kirkland v. National Mortgage Network, Inc.*, 884 F.2d 1367, 1371 (11th Cir. 1989) (*pro hac vice* status, once granted, vests attorney with right to due process prior to revocation). Like a license, benefit, or *pro hac vice* status, the writ of certiorari is not granted as a matter of right; but once it has been granted and an appellant has gone forward in reliance thereon, it should not be revoked without providing the appellant, at a minimum, with an explanation of the court's reasoning and an opportunity to address that reasoning. To require anything less is to enshroud the disposition of a case in needless mystery and to render meaningless any opportunity to move for rehearing or reconsideration.

In this instance, Healthmaster was given no explanation of the court's action beyond a terse statement that the case was "found not to satisfy the criteria for the grant of certiorari." 259 Ga. 587. Since the only criterion for certiorari specified in the Georgia Constitution is "gravity or great public importance," Healthmaster was left to wonder what other "criteria" the court might have been applying. The court had been provided no additional information concerning the gravity and importance of the case subsequent to the court's determination that the case was important enough to grant certiorari, so the impor-

tance of the case appears unlikely to have been the reason certiorari was revoked. In seeking rehearing, Healthmaster was thus put in the awkward position of having to speculate as to possible reasons for the court's action, and to address those reasons as best it could. This rather hopeless exercise illustrates well the breakdown of due process in this instance: having had no notice that the writ was still at issue, Healthmaster's only means of addressing the revocation of certiorari was by motion for rehearing; but having been given no explanation of the rationale behind revocation, Healthmaster had no opportunity to argue in favor of rehearing in any meaningful way. The motion for rehearing was denied without comment. (Page 1a, *infra*.). Such a denial of due process should be redressed and warrants review by certiorari.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this petition for a writ of certiorari be granted.

Respectfully submitted,

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Counsel for Petitioners

December 5, 1989

APPENDIX

Clerk's Office, Supreme Court of Georgia

Atlanta September 6, 1989

The motion for a rehearing was denied today:

Case No. 46972. Healthmaster, Inc., et al v. Chattahoochee Valley Home Healthcare, Inc.

All the Justices concur, except Hunt, J., not participating.

Yours very truly,

MRS. JOLINE B. WILLIAMS, Clerk

In the Supreme Court of Georgia

Decided: July 13, 1989

46972. HEALTHMASTER, INC. et al. v. CHATTAHOOCHEE VALLEY HOME HEALTH CARE, INC.

PER CURIAM.

After plenary consideration of this matter (*Healthmaster, Inc. et al. v. Chattahoochee Valley Home Health Care. Inc.; and vice versa*, ___ Ga. App. ___ (___ SE2d ___) (198), (Case Nos. 77388, 77389)), it is found not to satisfy the criteria for the grant of certiorari, and the writ is therefore vacated.

All the Justices concur, except Hunt, J., not participating.

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

ATLANTA MAY 4, 1989

Dear Sir:

Case No. 46972. HEALTHMASTER, INC. et al. v. CHATTAHOOCHEE VALLEY HOME HEALTH CARE, INC.

The Supreme Court today granted the writ of certiorari in this case. All the Justices concur, except Hunt, J., who dissents.

THIS CASE WILL BE ASSIGNED TO THE JULY 1989, ORAL ARGUMENT CALENDAR.

The Court is particularly concerned with the following:

1. Whether the SHPA was authorized to grant Healthmaster "grandfather" status in areas in which it would have been delivering services prior to July 1, 1979, had it not been for misdirection on the part of certain DHR employees.

2. The remaining enumerated errors.

Briefs filed in the Court of Appeals are included in the record presented to this court. Additional briefs are not required but may be submitted.

Very truly yours,

Joline B. Williams, Clerk

Mar. 3, 1989

In the Court of Appeals of Georgia.

77388, 77389. CHATTAHOOCHEE VALLEY HOME HEALTH CARE, INC. v. HEALTHMASTER, INC. et al.; and vice versa. BA-179, 180.

BANKE, Presiding Judge.

Healthmaster Home Health Care of Georgia, Inc., and its parent corporation, Healthmaster, Inc. (hereafter referred to together as Healthmaster) petitioned the State Health Planning Agency (SHPA) for a declaratory ruling as to whether three "home health agencies" which it (Healthmaster) had acquired were currently authorized under the State Health Planning and Development Act, OCGA § 31-6-1 et seq., to provide home health services in certain specified counties, without the necessity of obtaining a certificate of need pursuant to OCGA § 31-7-155. The SHPA determined that the acquired firms had "grandfather" rights in some, but not all, of the counties in question. Chattahoochee Valley Home Health Care, Inc. (Chattahoochee), a competitor home health care agency providing services in the same counties in which Healthmaster was granted grandfather status, applied to the Superior Court of Muscogee County for judicial review of this ruling pursuant to the Administrative Procedure Act (APA). See OCGA § 50-13-19. The superior court denied a joint motion by Healthmaster and the SHPA to dismiss the action and affirmed the SHPA's declaratory ruling. The case is now before us pursuant to our grant of Chattahoochee's application for a discretionary appeal. Healthmaster and the SHPA have filed

cross-appeals, contending that the lower court erred in denying their motion to dismiss. *Held*:

1. We first address the issue of Chattahoochee's standing to sue. In support of their joint motion to dismiss, Healthmaster and the SHPA contended that Chattahoochee was not an aggrieved person with standing to obtain judicial review of the SHPA' s decision pursuant to the Administrative Procedure Act and that Chattahoochee was, in any event, estopped from seeking such review because it had itself been doing business pursuant to the same grandfather status it sought to deny Healthmaster.

(a) Under the APA, any person "aggrieved by a final decision in a contested case" may obtain judicial review of that decision. "In the context of the Administrative Procedure Act, the word aggrieved has been interpreted to mean that the person seeking to appeal must show that he has an interest in the agency decision that has been specially and adversely affected thereby." *Ga. Power Co. v. Campaign for a Prosperous Georgia*, 255 Ga. 253, 257 (336 SE2d 790) (1985).

Construing analagous federal statutory law, the United States Supreme Court has long recognized that one who suffers or will suffer economic injury as the result of an administrative decision may be considered aggrieved for purposes of obtaining judicial review of the decision. See *Assoc. of Data Processing Svc. Organizations v. Camp*, 397 U. S. 150 (90 SC 827, 25 LE2d 184) (1970) (holding that a competitor has standing under the Federal Administrative Procedure Act, 5 U.S.C. § 702, to challenge an administrative action which adversely affects its business

interests). See also *Sierra Club v. Morton*, 405 U. S. 727 (92 SC 1361, 31 LE2d 636) (1972). Relying on the *Camp* decision, the Georgia Supreme Court, in *Hilton Const. Co. v. Rockdale County Bd. of Educ.*, 245 Ga. 533 (266 SE2d 157) (1980), held that the lowest bidder on a school construction project had standing to challenge the award of the contract to a competitor based on an alleged violation of State Board of Education regulations governing the bidding of such contracts. Thus, it appears to be well-settled that a business entity may be considered "aggrieved" by an administrative decision which confers an economic benefit upon a competitor.

Relying on *Diversified Health Mgmt. Svcs. v. Visiting Nurses Assn. of Cordele*, 254 Ga. 500, 502 (330 SE2d 885) (1985), Healthmaster and the SHPA contend that even if Chattahoochee's economic interests were adversely affected by the SHPA's decision, Chattahoochee nevertheless lacked standing to appeal that decision because such an appeal would not further the public purposes of the State Health Planning and Development Act. We disagree. The General Assembly instituted the certificate of need system to ensure that "[h]ealth care services and facilities . . . [are] provided in a manner that avoids unnecessary duplication of services, that is cost effective, and that is compatible with the health care needs of the various areas and populations of the state." OCGA § 31-6-1. In *Diversified Health Mgmt. Svcs. v. Visiting Nurses Assn. of Cordele*, supra, a provider of health care services sought to obtain injunctive relief against a competitor by bringing a direct action against the competitor pursuant to OCGA § 31-6-45 (d), which specifies that an "interested person shall have standing in any court of competent jurisdic-

tion to maintain an action for injunctive relief to enforce the provisions of this chapter." While the Georgia Supreme Court, citing *Executive Comm. of Baptist Convention of State of Ga. v. Metro Ambulance Svcs.*, 250 Ga. 61 (296 SE2d 547) (1982), held that this Code section did not confer standing for such an action, it went on to hold that the provider would have been authorized to bring a mandamus action against the SHPA to compel it to seek redress for an alleged violation of the Act by a competitor. We believe it logically follows from this ruling that a provider of health care services would also have standing to intervene in administrative proceedings already pending before the SHPA involving the operations of a competitor and that having done so, it would also have standing to seek judicial review of a final ruling adverse to its interests in such a proceeding. Accord *City of LaGrange v. Ga. Power Co.*, 185 Ga. App. 60 (363 SE2d 286) (1987) (where a municipality providing electrical service to its residents was permitted to appeal a declaratory ruling by the Georgia Public Service Commission authorizing the Georgia Power Company to provide competing services). Consequently, we hold that the superior court did not err in concluding that Chattahoochee had standing to bring the present action.

(b) We reject Healthmasters' contention that Chattahoochee was estopped from seeking judicial review of the SHPA's decision because it was operating in the affected areas under the authority of the same grandfather status which it sought to deny to the firms acquired by Healthmaster. Chattahoochee's authority to service the areas in question is not at issue in this proceeding, and there is no evidence upon which a resolution of that issue could be

made one way or the other. If, in fact, Chattahoochee's operations are also in violation of the Act, the appropriate remedy is not to sanction a similar violation by Healthmaster but to redress the alleged violation by Chattahoochee in a separate proceeding brought for that purpose. See *Executive Comm. of Baptist Convention of State of Ga. v. Metro Ambulance Svcs.*, supra. The superior court did not err in declining to dismiss the appeal, either on the basis that Chattahoochee lacked standing to seek review of the SHPA's decision or on the ground that it was estopped from doing so.

2. Pursuant to OCGA § 31-7-155, a home health care agency is required to obtain a certificate of need prior to "initiating service or extending the range of its service area." However, that requirement is qualified by the following language: "All home health agencies *which were delivering* services prior to July 1, 1979, and were certified for participation in either Title XVIII or Title XIX of the federal Social Security Act prior to such date shall be exempt from a certificate of need, except in those instances where expansion of services or service areas is requested by such home health agencies." *Id.* (Emphasis supplied.)

Although it is undisputed that the agencies acquired by Healthmaster had not been servicing the geographic areas at issue prior to July 1, 1979, the SHPA determined that those agencies had nevertheless acquired grandfather status in these areas because these agencies *would have* been providing services there prior to the effective date of the Act had it not been for misdirection on the part of certain employees of the Department of Human Resources (DHR). Chattahoochee contends that this determination was not authorized by the language of the statute, which

exempts from the certificate of need requirement only those home health care agencies which were *actually* delivering services in a given service area prior to July 1, 1979.

Generally speaking, " '[t]he administrative interpretation of a statute by an administrative agency which has the duty of enforcing its to be given great weight.' " *City of LaGrange v. Ga. Power Co.*, supra, at 63. However, "Where the language of the Act is plain and unequivocal, judicial [or administrative] construction is not only unnecessary but is forbidden." *City of Jesup v. Bennett*, 226 Ga. 606, 609 (176 SE2d 81) (1970). See also *Taco Mac v. City of Atlanta Bd. of Zoning Adjustment*, 255 Ga. 538, 539 (340 SE2d 922) (1986). In the case before us, the SHPA went beyond merely interpreting the language of the statute and, in effect, added an entirely new basis for an exemption. An interpretation of the statute which would permit an exemption to be granted to an agency based on a determination that, but for deference to bad advice on the part of a state official, it would have been delivering services to a particular area would create a radical departure from the general rule that one is not justified in relying upon a misrepresentation of law. See *Gowen v. Ga. Intl. Life Ins. Co.*, 163 Ga. App. 75 (293 SE2d 729) (1982). Finding nothing in the language of the statue which would reasonably support such a departure, we hold that the superior court erred in affirming the SHPA's decision.

3. The remaining enumerations of error are rendered moot by the foregoing.

Judgment reversed. Birdsong and Beasley, JJ., concur.

IN THE SUPERIOR COURT OF MUSCOGEE COUNTY

STATE OF GEORGIA

CHATTAHOOCHEE VALLEY HOME HEALTH CARE, INC., Petitioner,	)	
	)	CIVIL ACTION
v.	)	
	)	FILE NO. 87C-2547
THE STATE HEALTH PLANNING AGENCY, HEALTHMASTER, INC., and HEALTHMASTER HOME HEALTH CARE OF GEORGIA, INC., Respondents.	)	

ORDER

The above-styled matter is a petition for judicial review of a June 11, 1987 declaratory ruling issued to Respondent Healthmaster, Inc. by Respondent State Health Planning Agency. This Court having considered the record and pleadings, upon judicial review of the decision of the State Health Planning Agency it is the judgment of this court that such decision should not be reversed, and that the parties' motions for stay and to dismiss should not be granted. It is therefore Ordered, Adjudged and Decreed that the June 11, 1987 declaratory ruling of the State Health Planning Agency be and the same is hereby AFFIRMED, and that Respondents' motion to dismiss and petitioner's motion for stay be and the same are hereby DENIED.

This 22nd day of April, 1988.

/s/ John H. Land
Chief Judge, Superior Courts
Chattahoochee Judicial Circuit

June 11, 1987

Mr. Robert P. Williams, II
Troutman, Sanders, Lockerman and Ashmore
Candler Building, Suite 1400
127 Peachtree Street, N.E.
Atlanta, Georgia 30043-7101

Dear Mr. Williams:

The State Health Planning Agency has carefully reviewed the records which you submitted concerning the past history and accomplishments of Healthmaster, Inc. It is the Agency's determination that the home health agencies owned by Healthmaster should be authorized to operate pursuant to "grandfather status" as follows:

1. Central Georgia Home Health Agency, Inc., Macon, Bibb County: Shall be exempt from Certificate of Need review and able to serve the additional counties of Jasper, Bleckley, Pulaski, Butts, Laurens, Dodge, Lamar, Talbot, and Pike.

2. River Valley Home Health Agency, Inc., Butler, Taylor County: Shall be exempt from Certificate of Need review and able to service the additional counties of Muscogee, Harris, and Meriwether.

3. River Valley Home Health Agency, Inc., Cordele, Crisp County: Shall not be authorized by the State Health Planning Agency to operate in any additional counties without prior Certificate of Need approval.

4. River Valley Home Health Agency, Inc., Albany, Dougherty County: Shall be exempt from Certificate of Need review and able to serve the addi-

tional counties of Early, Miller, Decatur, Mitchell, Colquitt, Cook, Berrien, Tift, Irwin, Ben Hill, and Turner.

5. Health Help Services, Inc., Washington, Wilkes County: Shall be exempt from Certificate of Need review and shall be able to serve the additional counties of Jackson and Morgan.

6. Health Help Services, Inc., Augusta, Richmond County: Shall not be authorized by the State Health Planning Agency to operate in any additional counties without prior Certificate of Need approval.

7. Health Help Services, Inc., Waynesboro, Burke County: Shall not be authorized by the State Health Planning Agency to operate in any additional counties without prior Certificate of Need approval.

8. Health Help Services, Inc., Thomson, McDuffie County: Shall not be authorized by the State Health Planning Agency to operate in any additional counties without prior Certificate of Need approval.

As evidenced by the signatures below, all parties agree the determination stated above is a final Agency determination regarding grandfathering of the above listed home health agencies. Healthmaster, Inc. through its authorized representative, waives any and all legal rights accruing now or in the future regarding grandfathering of the above listed home health agencies.

After all signatures are in place, a copy of this determination will be furnished to the Standards and Licensure Section, Department of Human Resources, should you desire to seek certification under the state and/or federal subsidy programs.

I trust the above information adequately settles all issues regarding the grandfathering of the above-referenced home health agencies. If this is not so, please notify me within ten (10) days of the date of this letter. If these terms do meet with your approval, please sign this letter and have your client do the same. Please return the original signed copy to Annette Maxey at the Planning Agency so she may sign the document and forward it to Standards and Licensure.

Sincerely,

/s/ SUSAN L. BARANOFF, Attorney
State Health Planning Agency

/s/ ANNETTE MAXEY, Executive Director
State Health Planning Agency

/s/ W. RANDALL TYE, Attorney
Healthmaster, Inc.

/s/ JEANNETTE G. GARRISON
Executive Director
Healthmaster, Inc.

SLB/cb

FILED
JAN 12 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1045

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

HEALTHMASTER, INC., and HEALTHMASTER HOME HEALTH CARE OF GEORGIA, INC.,

Petitioners,

v.

CHATTAHOOCHEE VALLEY HOME HEALTH CARE, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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January 12, 1990

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RULE 28.1 LIST

Respondent Chattahoochee Valley Home Health Care, Inc. has no parent companies, subsidiaries, or affiliates to list pursuant to Rule 28.1.

White v. United States,
___ U.S. ___, 110 S.Ct. 273, 107 L.Ed.2d 6 (1989)..... 2, 3

Miscellaneous:

Rule 29 of the Rules of the Supreme Court of the State of Georgia, 252 Ga. A-6 (1984)..... 5

Ga. Const., Art. 6, § 6, ¶ 5..... 4

No. 89-1045

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

HEALTHMASTER, INC., andHEALTHMASTER HOME HEALTH CARE OF GEORGIA, INC.,

Petitioners,

v.

CHATTAHOOCHEE VALLEY HOME HEALTH CARE, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

The respondent Chattahoochee Valley Home Health Care, Inc., respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Georgia Supreme Court's opinion in this case. That opinion is reported at 259 Ga. 387, ___ S.E. 2d ___ (1989).

Although Petitioners' Statement of the Case contains certain misstatements of fact, those misstatements are not material to the issue of whether a writ of certiorari should be denied in this case.

REASONS FOR DENYING THE WRIT

Petitioners contend that this Court should review a decision of the Supreme Court of Georgia summarily vacating a writ of certiorari previously granted by that court. Petitioners concede that in Georgia, the decision whether to grant a writ of certiorari is entirely within the discretion of the Georgia Supreme Court. Nevertheless, Petitioners argue that a writ of certiorari, once granted, is a property right which cannot be revoked without notice and an opportunity to be heard.

Petitioners assert that "this issue has not previously been addressed directly by this Court." (Petition for Writ of Certiorari, hereinafter "Petition", at 6). That statement is inaccurate. In *Rice v. Sioux City Cemetery*, 349 U.S. 70 (1955), this Court dismissed a petition for writ of certiorari as improvidently granted. Although the Court explained its reasons for dismissing the writ in a detailed opinion, it also noted that such an explanation was not only unnecessary, but also unusual. *Id.* at 77. As indicated by Justice Frankfurter, the author of the majority opinion: *"[n]ormally for obvious reasons in view of our volume of business, no opinion accompanies dismissal of a writ as improvidently granted. . . . There is nothing unique about such dismissal even after full argument." Id.* (emphasis supplied). Thus, this Court has expressly approved the practice of summarily vacating writs of certiorari without opinions. Furthermore, this Court has itself frequently engaged in that practice. *See, e.g., White v. United States*, __ U.S. __, 110 S.Ct. 273, 107 L.Ed.2d 6 (1989); *Bryant v. Ford Motor Co.*, __ U.S. __, 109 S. Ct. 542, 102 L. Ed.2d 572 (1988); *Harbison-Walker Refractories v. Brieck*, 488 U.S. __, 109 S.Ct. 546, 102

L.Ed.2d 512 (1988); *Vermont v. Cox*, 484 U.S. 173 (1987); *Van Drasek v. Webb*, 481 U.S. 738 (1987).

Petitioners cite *Burrell v. McCray*, 426 U.S. 471 (1976) as support for their petition. Their reliance upon that case is misplaced. In *Burrell*, the majority, in a one-line opinion, dismissed a writ of certiorari as improvidently granted after the parties had already briefed and argued the case. Thus, in *Burrell*, as in numerous other cases, this Court engaged in the very practice which Petitioners contend was unconstitutional when committed by the Supreme Court of Georgia.

Petitioners correctly note that Justices Brennan and Marshall were sharply critical of the majority's decision to summarily vacate the writ in *Burrell*. Yet, the criticism of the dissenters in *Burrell* was not based upon constitutional principles of due process. *Id.* at 473-74. Rather, the dissent in *Burrell* must be limited to the particular facts of that case, particularly since Justices Marshall and Brennan have not dissented from subsequent summary writ dismissals by this Court as a matter of course. *See, e.g., White*, __ U.S. __, 110 S.Ct. 273, 107 L.Ed.2d 6; *Bryant*, __ U.S. __, 109 S.Ct. 542, 102 L.Ed.2d 572; *Harbison-Walker*, 488 U.S.__, 109 S.Ct. 546, 102 L.Ed.2d 512; *Vermont*, 484 U.S. 173; *Van Drasek*, 481 U.S. 738. Thus, even the dissent in *Burrell* provides no support for Petitioners' argument that the Georgia Supreme Court's dismissal of certiorari below "violates litigants' right to due process of law guaranteed by the Fourteenth Amendment." (Petition at 6).

There are sound reasons for the Georgia Supreme Court to follow the lead of this Court in summarily dismissing writs of certiorari in certain instances. A grant of

certiorari is based upon a preliminary examination of the issues raised in the petition. "Examination of a case on the merits, on oral argument, may bring into 'proper focus' a consideration which, though present at the time of granting the writ, only later indicates that the grant was improvident." *The Monrosa v. Carbon Black, Inc.*, 359 U.S. 180, 184 (1959). Furthermore, the function of the Georgia Supreme Court is to review cases "which are of gravity or great public importance." Ga. Const., Art. 6, § 6, ¶ 5. Whenever a writ of certiorari is granted, "it is not so much for the benefit of the parties in the particular case, as in aid of the law itself and its administration." *Adair v. The Traco Division*, 192 Ga. 59, 65, 14 S.E.2d 466, 469 (1941). Once the court has determined that its preliminary assessment as to the importance of the case was erroneous, it does not necessarily "aid" the law or its administration for the court to then conduct a hearing on whether the writ should be dismissed or to issue a detailed opinion on its rationale for dismissing the writ. Having taken a closer look at the case and determined that it is not sufficiently important to merit review on certiorari, the court is justified in disposing of it in a summary fashion and proceeding to the numerous other more important matters which compete for its time and resources.

Petitioners rely upon two Alabama Supreme Court cases and an article from *Am. Jur. 2d* as support for the proposition that an appellate court has "no option but to hear and determine the cause" once it grants a writ of certiorari. (Petition at 6). The authorities cited by Petitioners merely establish that a few state appellate courts, unlike this Court and the Supreme Court of Georgia, do not

summarily dismiss writs of certiorari as improvidently granted. That those state courts engage in a different practice than the Georgia and United States Supreme Courts does not indicate that the practice of the latter courts is unconstitutional.

Finally, Petitioners analogize a writ of certiorari to a license or other property interest which, "once granted cannot be revoked without notice and an opportunity to be heard." (Petition at 7). Yet, the Rules of the Supreme Court of Georgia state that *"review on certiorari is not a right."* 252 Ga. A-6 (1984) (emphasis supplied). Thus, decisions regarding writs of certiorari rest entirely within the discretion of the Georgia Supreme Court. Furthermore, the *Rice* decision, and this Court's practice regarding the dismissal of writs of certiorari as improvidently granted, establish that a writ is not a property interest in the same sense as a license or certain governmental benefits.

Even assuming arguendo that a writ of certiorari is a property interest entitled to due process protection, that interest "was itself conditioned by the procedural limitations which had accompanied the grant of the interest." *Arnett v. Kennedy*, 416 U.S. 134, 135 (1974). The writ of certiorari granted by the Supreme Court of Georgia was conditioned by the procedural limitation that it might be summarily vacated. Petitioners should have been aware of this procedural limitation at the time the writ was granted since the Georgia Supreme Court had summarily vacated writs of certiorari on previous occasions. *See, e.g., Clark v. Morris*, 258 Ga. 543, 373 S.E.2d 512 (1988).

Petitioners' arguments are wholly without merit and, indeed, border upon the frivolous. The Petition does not present "special and important reasons" for granting review on writ of certiorari and should be denied. Sup. Ct. Rule 17.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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January 12, 1990